

No. SC85970

IN THE
MISSOURI SUPREME COURT

STATE EX REL. FORD MOTOR COMPANY

Relator,

-vs-

THE HONORABLE HENRY WESTBROOKE, CIRCUIT JUDGE, DIVISION 3
CIRCUIT COURT OF GREENE COUNTY, MISSOURI

Respondent.

RELATOR'S BRIEF

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II. JURISDICTIONAL STATEMENT

This writ is before the Court on Relator Ford Motor Company's Petition for Prohibition to prevent The Honorable Henry Westbrooke, Judge of the Circuit Court of Greene County, from enforcing his Order denying Relator's objections to Plaintiff's discovery at issue and/or denying Relator to produce its consulting engineering materials which are protected from disclosure by the work-product and attorney-client privilege. Jurisdiction is proper in this Court pursuant to Article V, Section 3 of the Missouri Constitution because Relator alleges Respondent abused his discretion and exceeded his jurisdiction by denying Relator's objections to Plaintiff's discovery based on the work-product doctrine and/or attorney-client privilege and because Respondent's Orders exceeded the scope of Rule 56.01 of the Missouri Rules of Civil Procedure.

III. STATEMENT OF FACTS

1. This Writ presents the issue of whether the work product doctrine and attorney-client privilege protections are perpetual in nature, thereby protecting materials after the conclusion of the claim or case for which the protections were initially asserted.

2. The underlying products liability case arises from a one-vehicle accident involving a 1987 Ford Bronco II that occurred on October 11, 1999. (Ex. A at ¶¶ 8-9; Index A002.) Plaintiffs brought, inter alia, strict liability and negligence claims against Relator. (Ex. A at Counts I & II.)

3. On or about July 12, 2003, Plaintiffs served the following written discovery requests on Relator (copies attached as Ex. B; A015, A017, A018):

Interrogatory No. 38: Identify all independent entities and individuals who were paid by Ford to perform stability, maneuverability, crashworthiness and/or handling tests on any Ford Bronco II and the dates and titles of said tests.

Request for Production No. 34: Produce all testing conducted by any independent entity paid by Ford to test stability, maneuverability, crashworthiness and or handling tests on any Bronco II.

Request for Production No. 173: Produce all Design Analysis files and/or Product Analysis files for all accidents

investigated involving a Bronco II for the years 1984 through the present which are not currently involved in litigation. This should include, but not be limited to, all vehicle inspection requests, inspection reports, correspondence, memoranda and accident reports.

4. Relator objected to these discovery requests on the grounds the information and documents sought were protected from disclosure by the attorney-client privilege and/or work-product doctrine. On October 20, 2003, Plaintiffs filed a Motion to Compel Discovery relating to Interrogatory No. 38 and Requests for Production Nos. 34 and 173. In their Motion, Plaintiffs alternatively sought an Order requiring Relator to provide a privilege log identifying those documents Relator asserted were privileged and protected from discovery. (Plaintiffs' Motion to Compel Discovery attached as Ex. C.)

5. At issue in Plaintiffs' Motion to Compel Discovery was whether previously undisclosed information and documents which were generated before the subject accident and for, or on behalf of, Ford in anticipation/preparation of prior Bronco II cases were protected by the work-product doctrine. (Ex. C at p. 3; Index A020.) Plaintiffs argued "work-product" protects the document in the particular case for which the document was generated or gathered, but not subsequent cases. (Id. at p. 5; Index A024.)

6. In response to Plaintiffs' Motion to Compel Discovery, Relator argued the work-product doctrine was perpetual in nature and, thus, Plaintiffs were not

entitled to the work materials, testing, and conclusions of Relator's consulting experts who worked on prior Bronco II cases. (Relator's Response to Plaintiffs' Motion to Compel and Supplemental Response to Plaintiffs' Motion to Compel attached as Ex. D and Ex. E, respectively.)

7. On November 17, 2003, Respondent sustained, in part, Plaintiffs' motion and ordered Relator to produce a privilege log containing the necessary information required by law pertaining to Interrogatory No. 38 and Requests for Production Nos. 34, 93, and 173. (Order attached as Ex. F.)¹

8. On January 15 and 22, 2004, Relator provided Plaintiffs with privilege logs for Interrogatory No. 38 and Requests for Production of Document Nos. 34 and 173.

9. On January 22, 2004, Plaintiffs filed their Motion to Compel Discovery and For Sanctions, wherein they argued the privilege logs produced by Relator were untimely and inadequate. (Motion to Compel Discovery and For Sanctions attached as Ex. G).

¹ Although part of the Court's original Order requiring a privilege log, Relator has no information responsive to Request for Production No. 93 and, accordingly, there is nothing to set forth in a privilege log in response to this Request.

10. On February 23, 2004, Relator provided supplemental and revised privilege logs for these discovery requests. (All privilege logs attached as Ex. H.)²

11. On February 17, 2004, Plaintiffs filed their Supplemental Motion and Suggestions to Compel Material Designated on Ford's Privilege Log. (Attached as Ex. I. Relator has omitted pages 14-27 (original) from Ex. I, as these facts, issues, and contentions were not ruled on by Respondent and are not at issue in this Petition for Writ.)

12. On February 24, 2004, Relator filed its Response to Plaintiffs' Motion to Compel Discovery and For Sanctions. (Attached as Ex. J.) At the time of the hearing Relator had not yet filed a brief in opposition to Plaintiffs Supplemental Motion and Suggestions to Compel Material Designated on Ford's Privilege Log (Ex. I.)

13. At a March 15, 2004, hearing, after he reminded himself of the sole legal issue presented by the motion which led to the creation of the privilege logs - whether work product protection is perpetual - Respondent summarily overruled Relator's claims of work-product protection and attorney-client privilege with respect to Interrogatory No. 38 and Requests for Production Nos. 34 and 173. Respondent also ordered Relator to produce those documents identified in Relator's privilege logs

² Attorney-client privilege issues were not raised in the initial briefing or at the hearing on Plaintiffs' Motion. However, as shown in the privilege logs, Relator identified documents which required Relator to assert the attorney-client privilege.

within 30 days of the written Order. Respondent's Order was entered on March 18, 2004. (Order attached as Ex. K.)

14. Respondent appears to have overruled both the work-product protection and the attorney-client privilege claims based on the legal issue presented – are the work-product and attorney-client protections perpetual in nature - because Respondent did nothing to examine the merits of either the work-product protection or the attorney-client privilege claims. Respondent did not require Plaintiffs to articulate a basis for challenging each item listed in the privilege logs or to show substantial need for the work-product materials and an inability to obtain the substantial equivalent without undue hardship. Respondent did not request Relator to respond with briefing, affidavits, or other evidence in support of work-product or attorney-client items listed in the privilege logs and did not allow Relator to provide such further response when offered. Further, Respondent did not review the documents in camera. Finally, although offered by Relator, Respondent did not appoint a discovery master to conduct a proper review of the attorney-client privilege and work-product protection claims in order to rule on Relator's claims on the merits. (See Ex. K.)

IV. POINTS RELIED ON

- A. Relator is entitled to an order prohibiting Respondent from ordering Relator to produce consulting engineering materials, because such information and documents are subject to the work-product doctrine and/or attorney-client privilege, in that both privileges are perpetual in nature.

State ex rel. Day v. Patterson, 773 S.W.2d 224 (Mo. App. Ct. 1989)

In re Murphy, 560 F.2d 326 (8th Cir. 1977)

Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749 (Tex. 1991)

State ex rel. Classic III, Inc. v. Ely, 954 S.W.2d 650 (Mo. Ct. App. 1997)

- B. Relator is entitled to an order prohibiting Respondent from ordering Relator to produce consulting engineering materials, because such information and documents are subject to the work-product doctrine and/or attorney-client privilege, in that Respondent summarily overruled Relator's objections without due process.

Missouri Supreme Court Rule 56.01(b)(3)

State ex rel. Lester E. Cox Med. Center v. Keet, 678 S.W.2d 813 (Mo. 1984)

State ex rel. Friedman v. Provaznik, 668 S.W.2d 76 (Mo. banc 1984)

State ex rel. Dixon v. Darnold, 939 S.W.2d 66 (Mo. Ct. App. 1997)

V. STANDARD OF REVIEW

“Prohibition is the proper remedy when a trial court has abused its discretion in a discovery order to the extent that its act exceeds its jurisdiction.” State ex rel. Wilson v. Davis, 979 S.W.2d 253, 255 (Mo. Ct. App. 1998) (quoting State ex rel. Lichtor v. Clark, 845 S.W.2d 55, 59 (Mo. Ct. App. 1992)). “Prohibition may lie to prevent judicial violations of statutory inhibitions to discovery.” State ex rel. Dixon v. Darnold, 935 S.W.2d 66, 68 (Mo. Ct. App. 1997) (citation omitted). The trial court is vested with discretion regarding discovery, but mandamus will lie where the discretion has been exercised arbitrarily or capriciously. State ex rel. Metropolitan Transp. Svcs., Inc. v. Meyers, 800 S.W.2d 474, 476 (Mo. Ct. App. 1990). “A trial court abuses its

discretion when its ruling is clearly against the logic of the circumstances then before the court so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” Id.

VI. ARGUMENT

- A. Relator is entitled to an order prohibiting Respondent from ordering Relator to produce consulting engineering materials, because such information and documents are subject to the work-product doctrine and/or attorney-client privilege, in that both privileges are perpetual in nature.

1. The Work Product Doctrine is Perpetual in Nature.

The reasons for this Writ can be traced to Plaintiffs’ original contention that the work product protection afforded to consulting engineering materials does not survive the end of the case for which it was originally created. (See Ex. C p. 5; Index A024.) In fact, in Plaintiffs’ Motion to Compel Discovery (Ex. C), Plaintiffs acknowledged the documents they seek (consulting engineering materials) are protected by the work product doctrine. (See Ex. C at p. 5; Index A024). (“Plaintiffs do not dispute that Ford may have generated and/or collected the documents to prepare for litigation. However, Ford did so for prior litigation – not this case . . . In other words, work product protects the document in the particular litigation for which the document was generated or gathered, but no subsequent litigation.”) (emphasis in original).

Under Missouri Supreme Court Rule 56.01(b)(3), the work product doctrine is applicable to the discovery of documents prepared by a consultant “in

anticipation of litigation or for trial.” See State ex rel. Day v. Patterson, 773 S.W.2d 224, 227-228 (Mo. App. Ct. 1989). Rule 56.01(b)(3) provides in pertinent part:

Subject to the provisions of Rule 56.01(b)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under Rule 56.01(b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative, including an attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the adverse party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Rule 56.01 (emphasis added). Disclosure of the work materials, testing, and conclusions of Relator’s consulting experts would infringe on the long established work product doctrine as first set forth by the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495 (1947).

The weight of modern authority – both federal and state – is that the work product privilege is perpetual. See e.g. Shook v. City of Davenport, 497 N.W. 2d 883, 887 (Iowa 1993) (holding the work product privilege is perpetual in nature). That is, the privilege applies to documents prepared in the anticipation of terminated litigation. Id. The often relied-upon case, In re Murphy, expresses the majority view:

The primary purpose of the work product privilege is to assure that an attorney is not inhibited in his representation of his client by the fear that his files will be open to scrutiny upon demand of an opposing party. Counsel should be allowed to amass data and commit his opinions and thought processes to writing free of the concern that, at some later date, an opposing party may be entitled to secure any relevant work product documents merely on request and use them against his client. The work product privilege would be attenuated if it were limited to documents that were prepared in the case for which discovery is sought. What is needed, if we are to remain faithful to the articulated policies of Hickman, is a perpetual protection for work product, one that extends beyond the termination of the litigation for which the documents were prepared. Any less protection would generate the very evils that the Court in Hickman attempted to avoid.

In Re Murphy, 560 F.2d 326, 334 (8th Cir. 1977) (emphasis added). See also American Buildings Co. v. Kokomo Grain Co., Inc., 506 N.E.2d 56, 62 (Ind. Ct. App. 1987) (relying on the rationale of Murphy, the court held the work product doctrine applies to items prepared in anticipation of prior litigation, noting the holding is in accord with the majority of federal cases which have considered the question); SCM Corp. v. Xerox Corp., 70 F.R.D. 508 (D. Conn. 1976) (holding documents, once having been work product, did not automatically lose that protection in subsequent litigation); Burlington Indus. v. Exxon Corp., 75 F.R.D. 26 (D. Md. 1974) (same); Alachua Gen. Hospital, Inc. v. Zimmerman U.S.A., Inc., 403 So.2d 1087 (Fla. App. 1981) (holding work product retained its immunity in subsequent litigation, citing Hickman).

Missouri Courts have adopted the majority view (i.e. the work product doctrine is perpetual in nature), especially when the prior and instant cases are related. See State ex rel. Day v. Patterson, 773 S.W. 2d 224, 228 (Mo. Ct. App. 1989). The Patterson court found the “sounder view” to be that such work product documents prepared for and protected from disclosure in one case have the same protection in a second case, at least if the two cases are related. Id. at 228. The court noted Rule 56.01(b)(3), which permits discovery of documents “prepared in anticipation of litigation or for trial” only upon the requisite showing, is not so limited that it should be inapplicable to other complaints or causes different from the case at bar. Id. at 228. The court did not read the Rule to mean “prepared in anticipation of the litigation or for trial.” Id. at 228-29 (emphasis in original). Rather, the court concluded: “We construe the work product rule to mean that documents prepared in anticipation of any related litigation or

trial are qualifiedly immune and may be obtained only upon the requisite showings.” Id. at 229. Even the Missouri Supreme Court’s holding in State ex rel. Friedman v. Provaznik, cited in Plaintiffs’ Motion to Compel (Ex. C), acknowledged that the work product privilege is applicable to materials prepared in the “same or a related cause of action.” 668 S.W.2d 76, 80 (Mo. banc 1984). As noted by the Missouri Court of Appeals in State ex rel. Classic III, Inc. v. Ely:

Our courts have recognized that the work product doctrine continues to apply to protect the work product from discovery in related cases, since the real issue is whether or not the “the document can fairly be said to have been prepared or obtained because of the prospect of litigation” – whether the litigation in question or some other.

954 S.W.2d 650, 659 (Mo. Ct. App. 1997) (citing Patterson, supra).³

³ The United States Supreme Court has recognized that, at least under some circumstances, work product protection exists with respect to subsequent litigation, whether or not the later case was “related” to the case for which the original materials were prepared. See FTC v. Grolier, 462 U.S. 19, 26 (1983)(for purposes of a request under the Freedom of Information Act, materials prepared for any litigation or trial are protected “so long as they were prepared by or for a party to the subsequent litigation.”); 8 Wright & Miller, Federal Practice and Procedure § 2024 (1994).

Also engrained in the majority view is the notion that repeat litigants are entitled to the protection of a perpetual work product doctrine. See Owens-Corning Fiberglas Corp. v. Caldwell, 818 S.W.2d 749 (Tex. 1991). The Caldwell court considered the very issue presented in this Petition for Writ and held the work product doctrine is of a continuing duration. Id. at 751-52. The court, relying on In re Murphy, reasoned the underlying purpose of the work product doctrine, which is to provide a privileged area within which the lawyer can analyze or prepare a case, would be defeated if the doctrine were limited to documents that were prepared in the particular case for which discovery was sought. Id. at 750. The court further reasoned that “any party which is a repeat litigant clearly must be allowed to develop an overall legal strategy for all the cases in which it is involved. This is true [where] the litigant is a corporation sued repeatedly in products liability . . .” Id. at 751 (emphasis added). As noted by Justice Brennan in his concurring opinion in FTC v. Grolier, “[d]isclosure of work product connected to prior litigation can cause real harm to the interests of the attorney and his client even after the controversy in the prior litigation is resolved.” 426 U.S. at 26. Specifically, consumer product manufacturers, like Relator, who face litigation of a commonly recurring type “have an acute interest in keeping private the manner in which they conduct and settle their recurring legal disputes.” Id.

2. The Subject Information and Documents are Protected by a Perpetual Work Product Doctrine.

Relator is and has been repeatedly involved in products liability litigation involving Bronco II vehicles. In the instant case, the parties, the accident, and the

damages may differ from prior Bronco II cases, but the product, the defect allegations, and the legal issues remain virtually the same. Bronco II litigation has repeatedly dealt with the same issues; for example, handling and stability, center of gravity, and vehicle track width. Simply put, the present case is related to prior Bronco II cases for purposes of applying the work product doctrine.

Relator is entitled to develop a legal strategy for all cases in which it is involved. Part of that legal strategy includes the use of consulting experts. The written discovery that gives rise to this Petition for Writ seeks work materials, testing, and conclusions of Relator's consulting experts, both engineers at Ford and engineers at outside consulting engineering firms, who worked on prior Bronco II cases. This protected material was generated in anticipation of and/or in connection with prior Bronco II cases to defend against the pending and anticipated repetitive litigation involving the same alleged defects in Bronco II vehicles.

In addition, although attorney-client privilege issues were not raised in the initial briefing or at the hearing on Plaintiff's motion, as shown in the privilege logs, Relator identified documents which required Relator to assert the attorney-client privilege. The attorney-client privilege protects "confidential communications between an attorney and client concerning representation of the client." State ex rel. Polytech, Inc. v. Voorhees, 895 S.W.2d 13, 14 (Mo. banc 1995). Missouri courts consider the attorney-client privilege as a "fundamental policy, to which disclosure is the exception." State ex rel. Great American Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978). The rule of privilege extends to documents prepared by an agent or employee by direction of the

employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, whether such document is transmitted to the attorney by the client or by the agent or employee. State ex rel. Terminal R. Ass'n of St. Louis v. Flynn, 257 S.W.2d 69, 73 (Mo. banc 1953). The attorney-client privilege, like work product protection, is perpetual in nature. See Rules of Professional Conduct 4-1.6, comments (The principle of confidentiality is given effect in the attorney-client privilege, which includes the work product doctrine. The duty of confidentiality continues after the client-lawyer relationship has terminated.).

- B. Relator is entitled to an order prohibiting Respondent from ordering Relator to produce consulting engineering materials, because such information and documents are subject to the work-product doctrine and/or attorney-client privilege, in that Respondent summarily overruled Relator's objections without due process.

Respondent overruled both the work-product protection and the attorney-client privilege claims based on the legal issue presented - is work product protection perpetual in nature - because Respondent did nothing to examine the merits of either the work-product protection or the attorney-client privilege claims. Nonetheless, Plaintiffs oppose this Writ and argue the Order to produce the privileged/protected documents was proper because Relator failed to meet its burden in support of its claims for work-product protection and attorney-client privilege. Plaintiffs' argument fails as premature and irrelevant because Respondent did not examine the merits of the claims.

Relator anticipates Plaintiffs will argue Relator provided no evidence at the March 15th hearing to support its claims of work product protection and/or attorney-client privilege. Such an argument is disingenuous when one considers the purpose of the March 15th hearing. The March 15th hearing was intended to address whether the work product doctrine was perpetual in nature and to discuss the adequacy and timeliness of the privilege logs – the only issues presented by Plaintiffs’ Motion to Compel Discovery (Ex. C) and Motion to Compel and For Sanctions. (Ex. G.)⁴ The March 15th hearing was not intended to challenge the merits of Relator’s claims of work product and/or attorney-client privilege, as such a determination would have been premature under the circumstances. Before the March 15th hearing, Plaintiff never articulated a basis for

⁴ Relator acknowledges no record was made at the March 15, 2004 hearing, and Relator acknowledges the proposition of law that states “where no transcript of the proceedings below exists, there is an ‘assumption’ that the record then made provide[s] a reasonable basis for the exercise of the trial court’s discretion.” See State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 69 (Mo. Ct. App. 1997). An equally compelling legal maxim from the same case, however, holds that “[w]here the propriety of granting a motion depends on evidence but no evidence appears in the transcript, we cannot presume that proper evidence was adduced. To the contrary, if the transcript fails to show evidence was adduced, we must presume evidence was not adduced.” Id. at 69 n.3 (citing Fine v. Waldman Mercantile Co., 412 S.W.2d 549, 552 (Mo. Ct. App. 1967)).

challenging each item listed in the privilege logs or showed a substantial need for the work product materials and an inability to obtain the substantial equivalent without undue hardship. Plaintiffs may argue they challenged the merits of Relator's attorney-client claims in their Supplemental Motion and Suggestions to Compel Material Designated on Ford's Privilege Log, wherein they contend incident reports are not privileged communications because they were not made for the purpose of securing legal advice. (Ex. I at p. 9; Index 113.) However, no evidence was presented at the March 15th hearing regarding the role of Relator's design analysis engineer and Respondent did not allow the parties to prepare briefing and affidavits on the subject.⁵

It was not until the March 15th hearing that Relator's counsel found themselves involved in a substantive hearing on the merits of the work product and attorney-client privilege claims. The substantive nature of the hearing was the result of Plaintiffs' counsel offering a plethora of new, extraneous evidence, which included discovery orders in unrelated cases arising in other jurisdictions. Relator requested leave to submit briefing and evidence on the issues of work product protection and attorney-

⁵ Neither Plaintiffs' Motion to Compel Discovery and For Sanctions (Ex. G) nor Plaintiffs' Supplemental Petition and Suggestions to Compel Material Designated on Ford's Privilege Log (Ex. I) challenges the basis for Relator's work product protection and attorney-client privilege claims in any way. Moreover, any reference by Plaintiffs to the Alex Hollender case (Ex. I, sec. III, p. 5) is moot as the Hollender documents have been produced. (Ex. L.)

client privilege. Relator also suggested an additional hearing with witnesses be had and/or the use of an in camera review by the Respondent or an appointed discovery master. In lieu of any of the readily available and reasonable options, the Respondent did nothing except order the documents produced, despite the fact he had no record before him to decide the work product and attorney-client claims on the merits. Under these circumstances, if Respondent were to have ruled on the work product and attorney-client claims on the merits, such a ruling would be an abuse of discretion. See e.g. State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 71 (Mo. Ct. App. 1997) (In the absence of probative evidence before it with which to make its determination and in its failure to state the reasons for its discovery ruling, the trial court acted in an arbitrary and unreasonable manner)(citations omitted). Such circumstances do not support Plaintiffs' contention that Respondent ruled on the attorney-client privilege and work product protection claims on the merits.

At a minimum, Respondent should have conducted an in camera review before ruling on any attorney-client privilege issue. See State ex rel. Lester E. Cox Med. Center v. Keet, 678 S.W.2d 813, 815 (Mo. 1984) (suggesting in camera examination of records when lower court did not determine the extent to which the records requested reflected privileged communications); State ex rel. Friedman v. Provaznik, 668 S.W.2d 76, 78-80 (Mo. banc 1984) (mandating in camera hearing to determine applicability of attorney-client privilege to subpoenaed materials.); Edwards v. Missouri State Bd. of Chiropractic Examiners, 85 S.W.3d 10, 25-26 (Mo. Ct. App. 2002) (court conducted in camera review to determine if documents identified in privilege log were protected by

work product doctrine). See also Allstate Ins. Co., Inc. v. Walker, 583 So.2d 356, 358 (Fla. App. Ct. 1991) (Where work product and attorney-client privileges were asserted by insurer in response to discovery request, trial court was required to hold in camera inspection of discovery material at issue in order to rule on applicability of privileges); Weisel Enterprises, Inc. v. Curry, 718 S.W. 2d 56 (Tex. 1986) (even where party failed to allege attorney-client and work product privileges with sufficient specificity, trial court abused its discretion in denying discovery without an in camera review).

Respondent did not conduct an in camera review. Moreover, Respondent did not require Plaintiffs to articulate a basis for challenging each item listed in the privilege logs or to show substantial need for the work product materials and an inability to obtain the substantial equivalent without undue hardship. See Rule 56.01(b)(3). See also State ex rel. Safeco Nat. Ins. Co. of America v. Rauch, 849 S.W.2d 632, 635-36 (Mo. Ct. App. 1993) (to discover work product material, plaintiffs would be required to make the requisite showing of substantial need and an inability without undue hardship to obtain the substantial equivalent of the materials by other means); St. Louis Little Rock Hosp., Inc. v. Gaertner, 682 S.W.2d 146, 149 (Mo. Ct. App. 1984) (contents of investigations were protected from discovery by work product doctrine, where substantial need and undue hardship in obtaining equivalent information was not shown). Further, Respondent did not request Relator to respond with briefing, affidavits, or other evidence in support of work product or attorney-client items listed in the privilege logs and did not allow Relator to provide such further response when offered. (Writ Statement of Facts at ¶14.) Respondent's failure to take any of these steps illustrates Respondent never

considered any attorney-client privilege or work product protection issue on the merits. See, e.g., State ex rel. Dixon v. Darnold, 939 S.W.2d 66, 71 (Mo. Ct. App. 1997) (In the absence of probative evidence before it with which to make its determination and in its failure to state the reasons for its discovery ruling, the trial court acted in an arbitrary and unreasonable manner)(citations omitted)). Rather, Respondent's Order rested solely on the legal issue before him – whether the work product doctrine is perpetual in nature.

Plaintiffs have cited numerous decisions in their Supplemental Motion and Suggestions to Compel Material Designated on Ford's Privilege Log (Ex. I) for support that materials created by Relator's Design Analysis Engineers is not protected by the work product doctrine or attorney-client privilege. What Plaintiffs failed to note for the Court, however, is that the lower courts had conducted the review necessary to overrule the attorney-client and/or work product protection claims. For example, in the cases cited by Plaintiffs, the lower courts took steps like those discussed above before ruling on the merits of work product and/or attorney-client issues. See Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D.Nev. 1980), where plaintiffs made a showing of substantial need and the lower court actually reviewed the report at issue. Id. at 255. (See Ex. I; Index A0103, wherein Plaintiffs state Soeder is "directly on point."). See also Fine v. Facet Aerospace Products Co., 133 F.R.D. 439, *444 (S.D.N.Y.,1990) (court examined report at issue and considered statements made by in-house counsel who provided the purportedly privilege material); Janicker by Janicker v. George Washington University, 94 F.R.D. 648, 651 (D.C. D.C. 1982) (court examined report at issue); Henson By and Through Mawyer v. Wyeth Laboratories, Inc., 118 F.R.D. 584, 586 (W.D. Va. 1987)

(“The court must first determine whether the material sought to be protected falls within the purview of the applicable doctrine, and, if so, whether the requisite need or cause has been demonstrated for avoidance of doctrinal protection.”). Plaintiffs have also cited Miles v. Bell Helicopter Co., 385 F.Supp. 1029, 1032-33 (N.D. Ga. 1974) for the proposition that “investigations performed on the safety of a product are done in the ordinary course of business.” (See Ex. I; Index A0103.) The United States District Court for the Eastern District of Missouri declined to follow Miles and held the fact that litigation may still be a contingency at the time a document is prepared does not render the work product privilege inapplicable if the prospect of litigation is identifiable, and the party is still entitled to production only upon a showing of substantial need and undue hardship in obtaining the equivalent of the materials sought. See Fontaine v. Sunflower Beef Carrier, Inc., 87 F.R.D. 89, 93 (E.D. Mo. 1980). See also Abdallah v. Coca-Cola Co., 2000 WL 33249254, *4 (N.D. Ga. 2000)(recognizing Miles has been impliedly overruled).

In summary, the March 15th hearing was not the right forum to hear substantive arguments on Relator’s claims of work product protection and attorney-client privilege. Plaintiffs’ prior motions did not address such issues and, accordingly, Relator was not expecting to address the same. Respondent should have considered the timeliness and adequacy of the privilege logs and, if Respondent found some piece of detail lacking in the privilege logs, given Relator the opportunity to amend the privilege

logs.⁶ Thereafter, Plaintiffs should have been required to articulate their specific challenge to the work product and attorney-client materials, including a showing of substantial need for the work product materials and an inability to obtain the substantial equivalent without undue hardship. See Rule 56.01(b)(3). See also State ex rel. Safeco Nat. Ins. Co. of America v. Rauch, 849 S.W.2d 632, 635-36 (Mo. Ct. App. 1993) (to discover work product material, plaintiffs would be required to make the requisite showing of substantial need and an inability without undue hardship to obtain the

⁶ See, e.g., Wilson v. Foti, 2004 WL 856733, *2 (E.D. La. 2004) (“In lieu of producing the documents, the movers shall supplement the privilege log with the name of counsel in each of the contracts and the term of the contract.”); Chevron USA Inc. v. Peuler, 2004 WL 224579, *4 (E.D.La. 2004) (“The privilege log does not comply with Fed.R.Civ.P. 26(b)(5) . . . Chevron shall submit a revised privilege log.”); Cargotec, Inc. v. Westchester Fire Ins. Co., 802 N.E.2d 732, 735 (Ohio Ct. App. 2003) (it is unreasonable and an abuse of discretion to deny a request to supplement or clarify responses to discovery documents, including entries in a privilege log); Medtronic Sofamor Danek, Inc. v. Michelson, 2003 WL 21197027, *2 (W.D.Tenn.2003) (court further directs that Medtronic supplement its production of documents and submit supplemental privilege logs); Eppard v. Kelly, 2003 WL 23162316, *1 (Va. Cir. Ct. 2003) (the Court will give the Defendant the opportunity to amend the privilege logs before rendering a final decision on Plaintiff’s motion).

substantial equivalent of the materials by other means). This process was not followed. Respondent's ruling was based solely on the legal issue – whether the work product doctrine is perpetual in nature. If Plaintiffs are correct and Respondent ruled on the merits, he did so without due process – without giving Relator notice of Plaintiffs' challenge or an opportunity to defend against the same. Moreover, the ruling is unsupported in the law if construed, as Plaintiffs may suggest, as a discovery-based “sanction” rather than a ruling on the merits. Plaintiffs have not in prior briefing and cannot here refer the Court to any authority that validates Respondent's Order to disgorge valid attorney-client privileged and/or work product protected materials as a sanction for some alleged discovery violation. Relator searched for Missouri case authority but found no case that would uphold such a proposition, and nothing in Rule 61.01(d) indicates such a sanction is permissible.

VII. CONCLUSION

WHEREFORE Relator Ford Motor Company prays the Court to issue a permanent Writ of Prohibition commanding Respondent to set aside his prior Order and enter a new Order sustaining Relator's objections to the subject discovery requests on the grounds the discovery seeks documents and information protected from disclosure by the work-product doctrine and/or attorney-client privilege.

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